

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEAN L. ROACH,

Defendant-Appellant.

UNPUBLISHED

August 14, 2003

No. 239341

Wayne Circuit Court

LC No. 01-004053-01

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction for second-degree criminal sexual conduct (victim under thirteen) (CSC-II), MCL 750.520c(1)(a).¹ Defendant was sentenced to four to fifteen years in prison. We affirm.

I. Basic Facts

The victim is defendant's son. At a joint trial, he testified that when he was between six and eight years old defendant and his father, Kenneth Price, sexually abused him. The victim testified that his father engaged in anal intercourse with him multiple times. The victim further testified that defendant, who was not present during the father's abusive acts, once manually stimulated the victim's penis when she was alone with the victim. The jury found defendant guilty of CSC-II and Price was convicted of first-degree criminal sexual conduct (victim under thirteen) (CSC-I), MCL 750.520b(1)(a).²

II. Ineffective Assistance of Counsel

Defendant first argues that the trial court erred in finding she was not denied her Sixth Amendment right to the effective assistance of counsel based on defense counsel's failure to object to the consolidation of defendant's case with codefendant Price's case. Defendant argues that had defense counsel objected to consolidation, the trial court would have been required,

¹ This case was submitted with *People v Price*, Docket No. 239342.

² We affirmed this conviction in *People v Price*, Docket No. 239342.

pursuant to MCR 6.121(B), to sever her case from Price's because defendant's single CSC-II offense involving an isolated incident of touching was not related to Price's three CSC-I offenses involving anal penetration. While we agree that severance would have been required, we disagree that defendant was denied effective assistance of counsel.

While retaining jurisdiction, this Court remanded this case to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Thus, our review is based on the evidence presented at the hearing in addition to the facts apparent on the record. Whether the trial court properly applied the law to the facts is a mixed question of fact and constitutional law. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While a trial court's findings of fact are reviewed for clear error, questions of constitutional law are reviewed by this Court de novo. *Id.*

To establish that he was denied his right to the effective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-327; 521 NW2d 797 (1994). To prove deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 302-303.

At the *Ginther* hearing, defense counsel testified that initially he was not aware of the possibility of consolidating defendant's and Price's cases. Defense counsel stated that he believed that each defendant's preliminary examination was held separately, but at some point, the two cases were consolidated. Defense counsel believed that the consolidation had been done administratively, perhaps for economic reasons. Defense counsel testified that it was not his trial strategy to consolidate the cases, and that he had not filed a motion to consolidate. However, defense counsel also acknowledged that when consolidation occurred, he did not object. Defense counsel further admitted that he did not know much about Price's case other than that Price's charges were more serious than defendant's. After being faced with the fact that the cases would be tried together, defense counsel just tried to work with the situation, thinking that the consolidation might be to defendant's advantage.

Following the *Ginther* hearing, the trial court concluded that defendant had failed to show defense counsel's failure to object to consolidation deprived her of her right to effective assistance of counsel. The trial court found that defendant failed to show that defense counsel's performance was deficient, prejudicial, or fell below an objective standard of reasonableness such that it deprived defendant of a fair trial. The trial court further found that defendant failed to show a probability that the result of the trial would have been different absent defense counsel's failure to object to consolidation.

MCR 6.121 provides, in relevant part:

(A) Permissive Joinder. An information or indictment may charge two or more defendants with the same offense. It may charge two or more defendants with two or more offenses when

(1) each defendant is charged with accountability for each offense, or

(2) the offenses are related as defined in MCR 6.120(B).

When more than one offense is alleged, each offense must be stated in a separate count. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment under this rule.

(B) Right of Severance; Unrelated Offenses. On a defendant's motion, the court must sever offenses that are not related as defined in MCR 6.120(B).

(C) Right of Severance; Related Offenses. On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

MCR 6.120(B) provides:

(B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single scheme or plan.

Citing the commentary to the American Bar Association (ABA) Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968) Standard 1.1(b) on which MCR 6.120(B) is based in part, our Supreme Court summarized the three circumstances under which offenses may be deemed "related:"

The commentary accompanying the [ABA Standards Relating to Joinder and Severance] explains that "*same conduct*" refers to multiple offenses "as where a defendant causes more than one death by reckless operation of a vehicle." "*A series of acts connected together*" refers to multiple offenses committed "to aid in accomplishing another, as with burglary or larceny or kidnapping and robbery." "*A series of acts * * * constituting parts of a single scheme or plan*" refers to a situation "where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank." [*People v Tobey*, 401 Mich, 141, 151-152; 257 NW2d 537 (1977) (emphasis added).]

Applying these terms to the present case, we conclude that the charge against defendant was not based on the "same conduct" as the charges against Price because the record reveals that the sexual abuse for which defendant was convicted was entirely separate from the multiple incidents of sexual abuse for which Price was convicted. We further conclude that defendant's CSC-II offense and Price's CSC-I offenses were not based "upon a series of acts connected together" because the victim's testimony indicated that defendant's misconduct did not occur

during the same time frame as Price's misconduct, and defendant was not present when Price sexually abused the victim.

Furthermore, we conclude that defendant's act and Price's multiple acts were not "part of a single scheme or plan." In *People v McCune*, 125 Mich App 100, 103; 336 NW2d 11 (1983), this Court quoted the commentary to successor ABA Standard 13-1.2 relating to "common plan offenses," on which MCR 6.120(B) is also based:

"Common plan offenses are the most troublesome class of related offenses. These offenses involve neither common conduct nor interrelated proof. Instead, the relationship among offenses (which can be physically or temporally remote) is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses. A typical example of common plan offenses is a series of separate offenses that are committed pursuant to a conspiracy among two or more defendants. Common plan offenses may also be committed by a defendant acting alone who commits two or more offenses in order to achieve a unified goal."

There is no evidence in the record suggesting that defendant and Price were involved in a conspiracy to sexually abuse the victim, and there is no indication of a plan between the defendants tying the offenses they committed separately, to the achievement of a common goal not attainable by either of them independently. As a result, we find that defendant's CSC-II offense was not "related" to Price's CSC-I offenses as defined in MCR 6.120(B). Pursuant to MCR 6.121(B), the trial court would have been required to sever the cases had defense counsel objected to consolidation or moved for severance.

Further, the record indicates that defense counsel's failure to object to consolidation of defendant's and Price's cases was not a matter of sound trial strategy. As previously noted, at the *Ginther* hearing, defense counsel specifically testified that it was not his strategy at trial to have the cases consolidated. Despite the fact that he did not know the details of Price's case, he failed to object to consolidation. However, this does not end our inquiry.

We then must address whether defendant has affirmatively demonstrated a reasonable probability that, but for counsel's failure to object to consolidation, the result of the proceeding would have been different. Had defendant been tried separately, the jury would not have heard the victim's detailed testimony regarding the multiple incidents of sexual abuse he suffered at the hands of Price. Nonetheless, our duty is not to speculate on what improper inferences the jury could have drawn from the evidence presented, but rather, to determine whether the record, even without the evidence of Price's abuse, supported defendant's conviction. We find that it does.

The victim testified that defendant, his mother, took him into her bedroom, locked the door, and told him to remove his clothes. When the victim complied, she rubbed his penis until he ejaculated. A court may not determine the weight of the evidence or the credibility of the witnesses, regardless of how inconsistent or vague the testimony was. See, *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Rather, questions regarding the credibility of witnesses are to be left to the trier of fact. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997),

mod'd in part on other grds 457 Mich 885; 586 NW2d 925 (1998). Here, the victim's testimony was sufficient to establish the elements of CSC-II. Therefore, we find that defendant has failed to demonstrate a "reasonable probability" that the outcome of defendant's trial would have been different had she been tried separately.

III. Medical Expert

Defendant further argues on appeal that the trial court abused its discretion by denying her motion to appoint a medical expert to assist her defense. We disagree.

This Court reviews a trial court's denial of a defendant's motion to appoint an expert witness for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 398; 633 NW2d 376 (2001). In order to justify the appointment of an expert witness for an indigent defendant at public expense, the defendant must show that he cannot safely proceed to a trial without the proposed witness. MCL 775.15; *Herndon, supra*, at 399. "[A] defendant must show a nexus between the facts of the case and the need for [the] expert." *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997).

Based on the record, we hold that the trial court did not abuse its discretion in denying defendant's motion for an expert witness. As the trial court correctly concluded, defendant failed to meet his burden of persuading that an expert would aid the factfinder in making the ultimate decision in the case. See also *People v Smith*, 425 Mich 98, 105; 387 NW2d 814 (1986). The ultimate decision for the jury in the instant case was whether defendant was guilty of touching the victim in an inappropriate sexual manner, not whether the touching brought about any particular physical reaction from the victim. The endocrinologist's proposed testimony regarding the likelihood of a six-year-old boy being able to ejaculate sperm, and identify it as such, would not have aided the jury in resolving the ultimate issue in the case. Defendant, therefore, has failed to show a nexus between the facts of the case and the need for an expert.

Furthermore, cross-examination provided defendant with adequate opportunity to challenge the victim's statements and testimony about the sexual abuse he alleged defendant inflicted upon him. The record indicates that defense counsel questioned the victim about several inconsistencies in his testimony. In fact, on cross-examination, the victim admitted that when he was six years old, he did not know what sperm was, and did not learn about sperm until he was in the fifth grade, approximately five years after the alleged incident. Moreover, the trial court instructed the jury that it was to determine the credibility and weight to be given to a witness' testimony, that it was free to believe all, none, or part of any person's testimony. The trial court also instructed the jury that it should rely on its common sense and everyday experiences in making credibility determinations. Based on the record, we conclude that the trial court did not err in denying defendant's motion to appoint a medical expert.

IV. Proportionality of Sentence

Defendant also argues that the trial court's upward departure from the guidelines violated the principle of proportionality because the sentence imposed is disproportionate to the offense and the offender. We disagree.

Because the offense of which defendant was convicted occurred before January 1, 1999, the judicial sentencing guidelines apply. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Generally, this Court reviews a trial court's decision to depart upward from the sentencing guidelines for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636, 657, n 25; 461 NW2d 1 (1990). A trial court sentencing a defendant under the judicial guidelines abuses its discretion if it violates the principle of proportionality. *Id.* at 636. This principle is violated if the sentence is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*

The crucial test for proportionality is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995). A trial court departing upward from the sentencing guidelines must place its reasons for doing so on the record at the time of sentencing. *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987). A court may justify an upward departure by reference to factors considered, but adjudged inadequately weighed, within the guidelines, as well as by introducing legitimate factors not considered by the guidelines. See *People v Granderson*, 212 Mich App 673, 680-681; 538 NW2d 471 (1995).

In the instant case, the sentencing information report prepared on defendant's behalf indicated a recommended sentencing guidelines range of zero to thirty-six months' imprisonment for defendant's CSC-II conviction. The trial court sentenced defendant to a minimum of forty-eight months, and explained that the reason for its upward departure was that not only did defendant fail to protect her child from Price, but defendant sexually assaulted her own child in a manner that "would clearly impact the whole entire rest of his life." Based on the record, we find these were legitimate factors not considered by the guidelines, as well as aggravating factors that the trial court could properly consider. Therefore, we find the trial court did not abuse its discretion in departing from the guidelines, and defendant's sentence does not violate the principle of proportionality.

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Kirsten Frank Kelly